Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 1 and 22 of the Commission's	)	WT Docket No. 12-40
Rules with Regard to the Cellular Service,	)	
Including Changes in Licensing of Unserved Area	)	RM No. 11510
	)	
Amendment of the Commission's Rules with	)	
Regard to Relocation of Part 24 to Part 27	)	

COMMENTS OF AT&T

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EXECUTIVE SUMMARY

AT&T Services, Inc., on behalf of AT&T Mobility LLC and its wholly-owned and controlled wireless affiliates (collectively "AT&T"), appreciates the opportunity to provide comments on the Federal Communications Commission's (the "Commission") Notice of Proposed Rulemaking ("*Notice*") in this important docket and to share its perspective on the proposals presented in that *Notice*. As broadband connectivity becomes more essential to our way of life, it is increasingly indispensable to eliminate unnecessary hurdles to broadband expansion and streamline the processes that facilitate deployment. Properly decided and implemented, this docket can produce that result.

In the *Notice*, the Commission proposes to modify the licensing rules for cellular service to eliminate site-based filings and to auction overlay licenses for all cellular market areas ("CMAs"), including those CMAs with no unserved area. AT&T agrees with the Commission that eliminating site-based filings for cellular service will reduce administrative burdens and increase flexibility for licensees. AT&T encourages the Commission to advance these goals by transitioning all cellular service to geographic-area licenses immediately rather than delay the transition of CMAs with less coverage.

The Commission should also retain the Phase II unserved area rules for all CMAs and abandon the prospect of auctioning cellular overlay licenses. An auction would undermine the Commission's stated goals by increasing the complexity of cellular licensing, creating potential coordination and interference disputes with overlay licensees, and freezing incumbent cellular licensee systems. It is also unnecessary and would undercut regulatory parity for similar mobile services, grant overlay licensees only illusory rights to serve, and violate the Communications Act. In contrast, retaining the Phase II unserved area rules is simpler, easier to administer, and

allows cellular licensees more flexibility in modifying their systems, all without the risks and uncertainty of the overlay auction scheme.

In proposing the transition of cellular service to a geographic-area model, the Commission posits that the elimination of site-based filings would reduce administrative burdens borne by cellular licensees and Commission staff and increase flexibility for cellular licensees. AT&T agrees that site-based licensing imposes administrative burdens on cellular licensees, unduly limits the flexibility of cellular licensees to adapt to technological and marketplace changes, and needlessly consumes Commission resources. Cellular systems are not static. Cellular licensees frequently adjust power, direction and tilt of antennas, and other network attributes to address customer needs and improve network performance. Each of these changes requires a site-specific filing for sites comprising the border of the cellular geographic service area ("CGSA").

In addition to day-to-day modifications, cellular systems are continuously evolving, as evidenced by the advancement of technology from analog, to 2nd Generation digital, to 3rd Generation, to 4th Generation HSPA+, and soon to 4th Generation LTE. Each technology upgrade also involves the installation of new sites and the modification of existing sites, such as adding or changing antennas or modifying the height, direction, or tilt of antennas, all of which require prior Commission approval for sites comprising the outer contour of the CGSA, even if that CGSA does not change. Gathering necessary information and preparing these filings unduly burdens cellular licensees and delays the roll out of advanced broadband service. Unless the Commission takes action, cellular licensees will continue to suffer from these delays and the roll-out of broadband service will suffer.

Transitioning cellular service to geographic area licenses also brings cellular service into regulatory parity with the more flexible licensing schemes used by other mobile services, such as PCS, AWS, and 700 MHz services, satisfying the Commission's preference for technology-neutral regulations. Each of these similar mobile services are based upon geographic area licenses, with periodic build-requirements, and have successfully operated under those rules for years. Cellular licensees would do the same. For all of these reasons, the Commission should follow-through with its proposal in the *Notice* to transition to geographic area licenses.

However, contrary to the two stage transition proposed in the *Notice,* all CMAs should transition to geographic-area licenses simultaneously. The benefits that cellular licensees and Commission staff would derive from transitioning away from site-based are too significant to justify a delay of any CMAs, especially a delay of seven years. Moreover, retaining the site-based licensing rules for CMAs that are not yet "substantially licensed" delays the deployment of advanced broadband service in those CMAs, an untenable position in today's broadband driven world. Transitioning CMAs in stages also adds to the complexity of the cellular licensing scheme and creates confusion as to which licenses have transitioned to geographic area licenses and which have not transitioned. These reasons and the absence of any downside to an immediate transition of all CMAs should lead the Commission to transition all CMAs to geographic area licenses simultaneously.

The Commission should also abandon the proposal to strip cellular licensees of a portion of their license rights in order to auction off duplicative "overlay" licenses. This proposal is unnecessary, unwise and unlawful. Cellular service is the most extensively deployed mobile wireless band, with many CMAs fully-served, where an overlay licensee could not expand coverage. In many other CMAs, the unserved area is not practical to serve because it is too

small, is irregular in shape, or it is located in difficult to serve areas. Moreover, there appears to be no need for a complicated regulatory scheme to expand service to these unserved areas, as the Phase II unserved area application process has resulted in the steady expansion of coverage. Simply put, there is no need to hold auctions. A overlay auction would grant merely illusory rights to serve to the overlay licensee. Whether anyone would bid for those rights is questionable, but it unnecessarily introduces the risk of a failed auction, all the while preventing incumbent cellular licensees from incrementally expanding service to cover those unserved areas as the marketplace dictates.

A cellular overlay auction would undermine the very goals that the Commission espouses in the *Notice*, as it would increase the administrative burdens on cellular licensees and reduce the flexibility of cellular licensees. Cellular licensees have long coordinated successfully with neighboring licensees, but adding a second licensee in each CMA in this most heavily utilized mobile wireless band will change that equation. Disputes will almost surely develop with overlay licensees over the extent of interference protection and the extent of the overlay licensee's right to cover areas that it may believe that the incumbent cellular licensee no longer sufficiently serves, creating substantial burdens for incumbent licensees and requiring the dedication of significant resources to resolve. Further, the proposed rules would effectively freeze incumbent cellular networks by preventing service area boundary ("SAB") extensions from additional transmitters. These consequences of the overlay auction proposal would not serve the public interest.

The auction proposal also undermines the Commission's preference for technology neutral regulations. An overlay auction scheme for cellular service would impose a new, complicated set of regulations that are not imposed on any other mobile service. PCS, 700 MHz,

and AWS licensees are authorized to continue expanding service if they meet their build-showing. Yet, the cellular overlay proposal set forth in the *Notice* would effectively subject incumbent cellular licenses to a 100% build-out requirement by precluding the expansion of service into new geographic areas, even with Commission consent. Such a move seems imprudent, as the incremental expansions undertaken by incumbent cellular licensees are often the best opportunity to provide coverage to an unserved area.

The Commission's authority to adopt an overlay auction plan for cellular service is also subject to question. Section 309(j)(1) of the Communications Act authorizes the Commission to use competitive bidding to award only "initial" licenses, but an overlay license would be anything but the "initial" license. The "initial" cellular licenses are held by the incumbent cellular licensees and were initially awarded long before the Commission had auction authority.

In light of the questionable rationale for imposing the overlay auction scheme on cellular service proposed in the *Notice*, it is also reasonable to question whether the Commission's true motive for the overlay auction plan is to create a mechanism to collect revenue for the use of cellular spectrum. Such an auction would violate the prohibition in Section 309(j)(7)(A) of the Communications Act against using competitive bidding for the purpose of generating revenue for the Federal Treasury. It would also be arbitrary and capricious, as it treats similarly situated mobile licensees differently and imposes burdens and costs that are grossly out of the proportion to any benefit to be derived. Additionally, Section 309(j)(6)(E) of the Communications Act requires the Commission to "use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings" whereas the service rules proposed in the *Notice* would seem to establish a scheme that would promote mutually exclusive applicants.

Cellular licensees have consistently served the public for almost three decades and, as recognized in the *Notice,* have extensively built-out nearly all CMAs. Marketplace demand drives cellular licensees to constantly expand the reach and quality service to the benefit of the American public. Some unserved areas remain because marketplace demand does not exist in those geographic areas (or because those areas may be extremely difficult to serve), not because cellular licensees have failed to expand service or fully utilize cellular spectrum. The public interest is not served by creating new, complicated overlay licensing rules that are unlikely to result in any material increase in coverage.

Rather, the Commission should leave intact the Phase II unserved area rules, which would allow any qualified party to continue to have access to unserved areas without introducing the complexities, potential unforeseen consequences, and legal problems that an auction of overlay licenses could present. Cellular licensees would still be free to expand into unnerved area as the marketplace dictates. Cellular licensees seeking to expand their license area can file an application with the Commission. Although these site-specific filings would remain, they would be completely voluntary and relatively few compared to the volumes of filings made under the current rules. Retaining the Phase II unserved area rules coupled with the simultaneous transition of all CMAs to geographic-area licenses would serve the Commission's goals stated in the *Notice* and accelerate the future deployment of advanced broadband service in the cellular service.

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COMMENTS OF AT&T

AT&T submits these comments in response to the Notice[1] released by the Commission seeking to transition the 800 MHz cellular radiotelephone service from a site-based licensing model to a geographic-based licensing model. In the *Notice*, the Commission proposes to modify the existing cellular rules to impose a two stage transition of cellular licenses from site-based to geographic-area based, with "substantially licensed" CMAs converting immediately and CMAs that are not "substantially licensed" converting seven years later. The Commission further proposes to auction overlay licenses for each CMA after it is converted to a geographic-area license.

In these comments, AT&T supports the Commission's proposal to transition the CMAs to geographic-area licenses, but explains that all CMAs should be transitioned simultaneously to immediately realize the substantial benefits to be gained and in the absence of a good reason to delay the transition. AT&T also explains that the Commission should retain the Phase II unserved area rules rather than adopt an overlay complicated and legally suspect overlay auction

[1] Amendment of Parts 1 and 22 of the Commission's Rules with Regard to the Cellular Service, Including Changes in Licensing of Unserved Area, Amendment of the Commission's Rules with Regard to Relocation of Part 24 to Part 27, WT Docket No. 12-40, RM No. 11510 (2012).

proposal that would undermine the Commission's stated goals and delay broadband deployment on cellular service.

I. REVISING THE CELLULAR LICENSING RULES WILL MINIMIZE ADMINISTRATIVE BURDENS, INCREASE FLEXIBILITY FOR LICENSEES, AND RESTORE REGULATORY PARITY FOR CELLULAR LICENSEES.

A. Transitioning to Geographic-Area Licenses Will Remove Unnecessary Administrative Burdens and Inefficiencies That Delay the Deployment of Advanced Broadband Services.

AT&T strongly supports the Commission's effort to transition cellular service from a site-based licensing regime to a geographic-area licensing regime. The Commission recognizes in the *Notice* that "application filings are required for even minor technical system changes."[2] But, these technical filings have unseen costs—the significant time and resources spent by Commission staff to review the filings and the significant time and resources expended by cellular licensees to prepare and file these system changes on a site-by-site basis. Further, the delays associated with preparing and making these filings delays the deployment of advanced broadband services.

Cellular licensing rules that require the Commission to accept and review unnecessary site-specific filings waste Commission resources. Detailed site-specific data is not needed for the Commission to advance the efficient use of spectrum or foster competition in the wireless arena, as is evident from the competitive state of the wireless industry and the proliferation of advanced wireless services over spectrum bands that are not subject to site-specific licensing

[2] *Id.* at 11.

rules.[3] Site-based filings also require the Commission to commit substantial staff and information technology resources to gather and review the detailed site-specific information provided in those filings. Eliminating these site-based filings would relieve the Commission of those administrative burdens and free-up Commission staff and information technology resources for dedication to more productive endeavors.

The collection and maintenance of site-specific cellular data is also time-consuming and burdensome for cellular licensees and delays the deployment of advanced broadband services. Digital networks evolve frequently as licensees strive to increase network reach and address capacity issues on a nearly continuous basis. As part of their day-to-day routine adjustments to improve network performance and to support ongoing deployments of technology upgrades, such as the evolution of cellular networks from 2nd Generation digital, to 3rd Generation, to 4th Generation HSPA+, and soon to 4th Generation LTE, cellular licensees constantly replace antennas and other equipment, adjust the power, and adjust the direction and tilt of antennas. Each of these modifications requires a site-based filing to the extent it impacts a site at the edge of the CGSA. Cellular licensees spend substantial time and resources preparing and filing these modifications, which then require substantial Commission resources to review and approve, all to comply with rules that the Commission does not deem necessary for PCS, AWS, and 700 MHz licensees.

Importantly, the antiquated Part 22 licensing rules also restrict the ability of cellular licensees to quickly modify their cellular networks as needed to adapt to customers' changing

[3] *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Thirteenth Report*, WT Docket No. 08-27 (2009).

needs. This level of inflexibility leads to administrative inefficiency, as well as network inefficiency, as a routine change to a boundary site to improve coverage in the cellular network requires the cellular licensee to delay the effect of the change in order to prepare and prosecute a site-specific filing. It further leads to delays in the provision of advanced broadband services. As referenced above, cellular licensees constantly modify and upgrade their networks, such as by replacing antennas and other equipment, adjusting the power, and adjusting the direction and tilt of antennas. With the acceleration of broadband deployment, these modifications will continue and likely accelerate. Yet, under the current rules, cellular licensees must wait to make a site-specific filing. Relieving cellular licensees and the Commission of this time-consuming exercise will increase administrative efficiencies for the Commission and cellular licensees while simultaneously providing flexibility for cellular licensees, which will foster faster and more efficient provision of next-generation digital technologies and services.

B. Transitioning Cellular Licensing To Geographic-Area Licensing Will Facilitate Regulatory Parity Between Cellular and Competitive Services.

Shifting cellular licensing to a geographic area-based license system will also further the Commission's goal of technology-neutral regulation, and in doing so, create regulatory parity among competitive wireless services.[4] In auctioning off and distributing PCS, AWS, and 700 MHz spectrum, the Commission concluded that market area licensing better promotes efficient

[4] *See Implementation of Section 3(n) and 332 of the Communications Act*, Second Report and Order, 9 FCC Rcd 1411, 1418 (1994) (stating that one of Congress' principal objectives in amending Section 332 of the Communications Act was "to ensure that similar services would be subject to consistent regulatory classification" and that it was the intent of Congress that "consistent with the public interest, similar services are accorded similar regulatory treatment").

network development.[5] Cellular licensees seek to benefit from those efficiencies and operate their cellular facilities under the same, efficient geographic licensing rules in parity with other mobile wireless bands.

C. An Immediate Transition of All CMAs to Geographic Licenses Would Accelerate the Commission's Goals with No Adverse Effect.

AT&T would encourage the Commission to transition the Stage II CMAs—CMAs that are not "substantially licensed"—immediately, at the same time as the Stage I CMAs, rather than wait seven years after the effective date of the rules. In the *Notice*, the Commission justifies the delay between transitioning the Stage I and Stage II CMAs on the need to "preserve direct access to such [unserved] area through the Commission's Unserved Area application process."[6] However, the transition to geographic area licensing for CMAs that are not "substantially licensed" need not be delayed to preserve such access. Stage II CMAs could immediately transition to geographic area licensing with the Stage I CMAs and, as the Commission proposes, continue to fall under the Phase II unserved area rules for a period of time to allow access to unserved area within those CMAs. The transition to geographic area licensing need not be tied to the Phase II unserved area rules.

As described above, transitioning cellular service to geographic-area licensing would relieve both cellular licensees and Commission staff of the needless administrative burdens of site-specific filings, increase the flexibility of cellular licensees to respond to marketplace demands, and lead to more efficient system operation. These benefits far outweigh the few, if any, advantages to be gained from retaining the site-specific requirements for a seven, or even

[5] *See* 47 C.F.R. §§ 90.683 (800 MHz ESMR); 24.102 (narrowband PCS); 47 C.F.R. §§ 24.202 (broadband PCS); 27.6(h) (AWS); 27.6(b),(c) (700 MHz).

[6] *Notice* at 17.

three, year transition period. Moreover, while expansions of coverage would still be subject to current unserved area application procedures, an immediate transition to geographic-area licensing of existing CGSAs would avoid delays in the deployment of advanced broadband services in CMAs that are not "substantially licensed," which are more likely to comprise rural or geographic areas that already typically lag more populous areas in the deployment of advanced services. Transitioning all CMAs to geographic area licenses simultaneously would more effectively and promptly advance the Commission's goals than a phased transition, with no adverse impact.

II. ABANDONING THE PROPOSED OVERLAY AUCTION MODEL IN FAVOR OF RETAINING THE PHASE II UNSERVED AREA LICENSING RULES WOULD ACCOMPLISH THE COMMISSION'S GOALS WITH MINIMAL CHANGES.

While AT&T supports the proposed elimination of needless site-based filings, it opposes the proposal to strip cellular licensees of a portion of their license rights in order to auction off duplicative "overlay" licenses. This proposal is unnecessary, unwise and unlawful. Cellular service is the most extensively deployed mobile wireless band. By the Commission's count, in more than 80 percent of all CMAs 95 percent or more of the geographic area in the CMA is covered, and many CMAs have no unserved areas. Clearly "overlay" licenses in fully-served CMAs would do nothing to expand coverage, and in the CMAs in which some unserved area remains, the existing unserved area application process appears to have resulted in the steady expansion of coverage. Simply put, there is no need to hold auctions.

Such overlay licenses would not be initial licenses—the same spectrum, covering the same geography for the same service were issued as CMA licenses initially many years ago. Moreover, there is no indication that mutually exclusive applications for the remaining unserved areas necessitate auctions. Indeed, in many CMA's there are no unserved areas to apply for. Not

only are overlays unnecessary, they would be unwise, as the incumbent cellular licensee would be prohibited from expanding coverage (as is possible today with site-based filings). Moreover, adding a second licensee in spectrum that is already licensed and fully deployed will lead to needless interference and disputes. Indeed, such overlay auctions would be unlawful, as the issuance of duplicative licenses in fully deployed spectrum would appear to be designed primarily to generate auction revenue, which is prohibited under Section 309.

A. The Overlay Auction Proposal Would be Counterproductive.

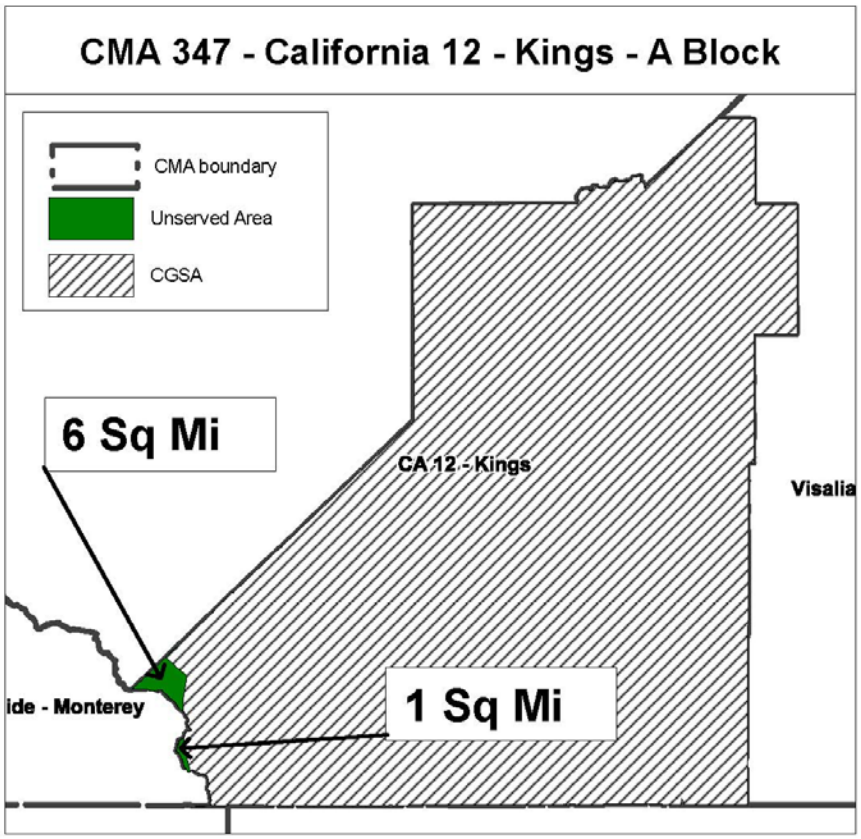
The Commission should abandon the overlay auction proposal because of the substantial risk of a failed overlay auction and because it would impede broadband build-out. The overlay auction rules proposed in the *Notice* would authorize the overlay licensee to provide cellular service within the areas of the CMA that are unserved or within the whole CMA if the incumbent cellular licensee cancels their license or permanently discontinues service. However, given the history of cellular licensees incrementally expanding service over time, rather than abandoning service areas, overlay licensees, who would have only secondary rights, could serve only unserved areas. And, that right to provide service in unserved areas would for most CMAs be merely illusory, because, as the Commission recognizes, "most Cellular Service markets are almost completely licensed, with only limited unlicensed Cellular Service area remaining"[7] and for CMAs that do have unserved areas, the "remaining [u]nserved [a]rea . . . may be very small, fragmented, and/or not immediately servable."[8]

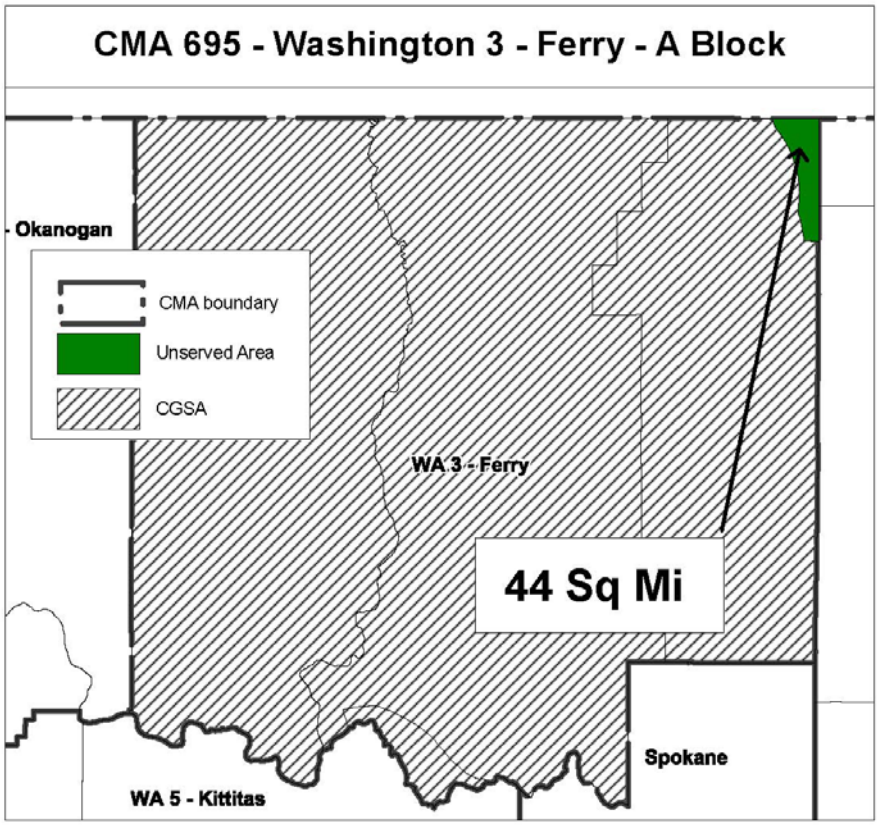
By way of example, the maps below of CMA 347 – CA RSA 12 Kings and CMA 695 – WA RSA 3 Ferry illustrate the futility of attempting to auction small, fragmented areas that are

[7] *Notice* at 2.

[8] *Id.* at 16.

not servable for technical reasons. In those CMAs, very little unserved area remains and the unserved areas, two areas of 6 square miles and 1 square mile for CMA 347 and an area of 44 square miles for CMA 695, are too small to serve with independent systems.

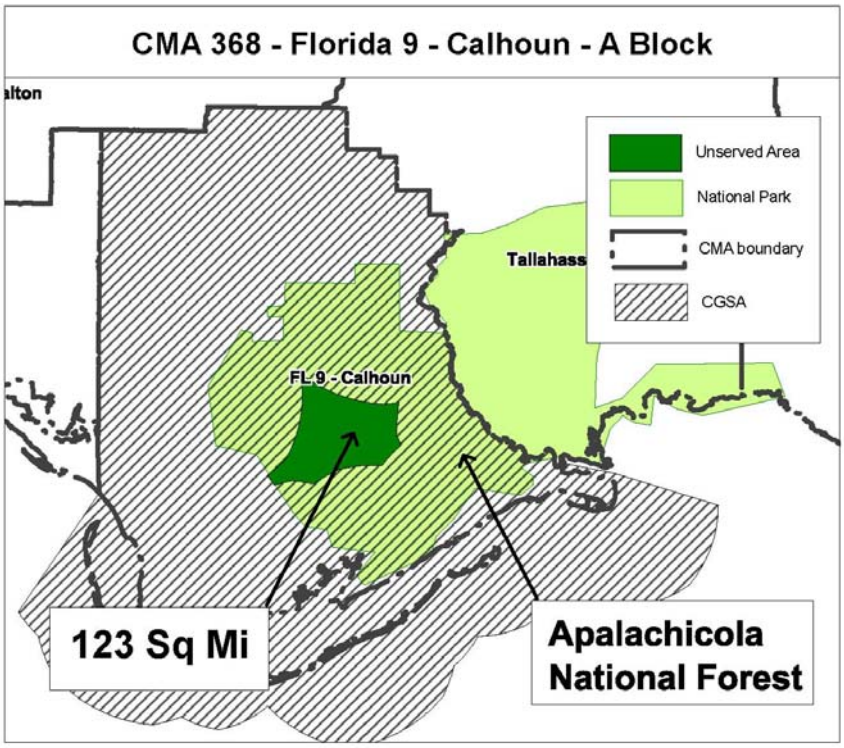


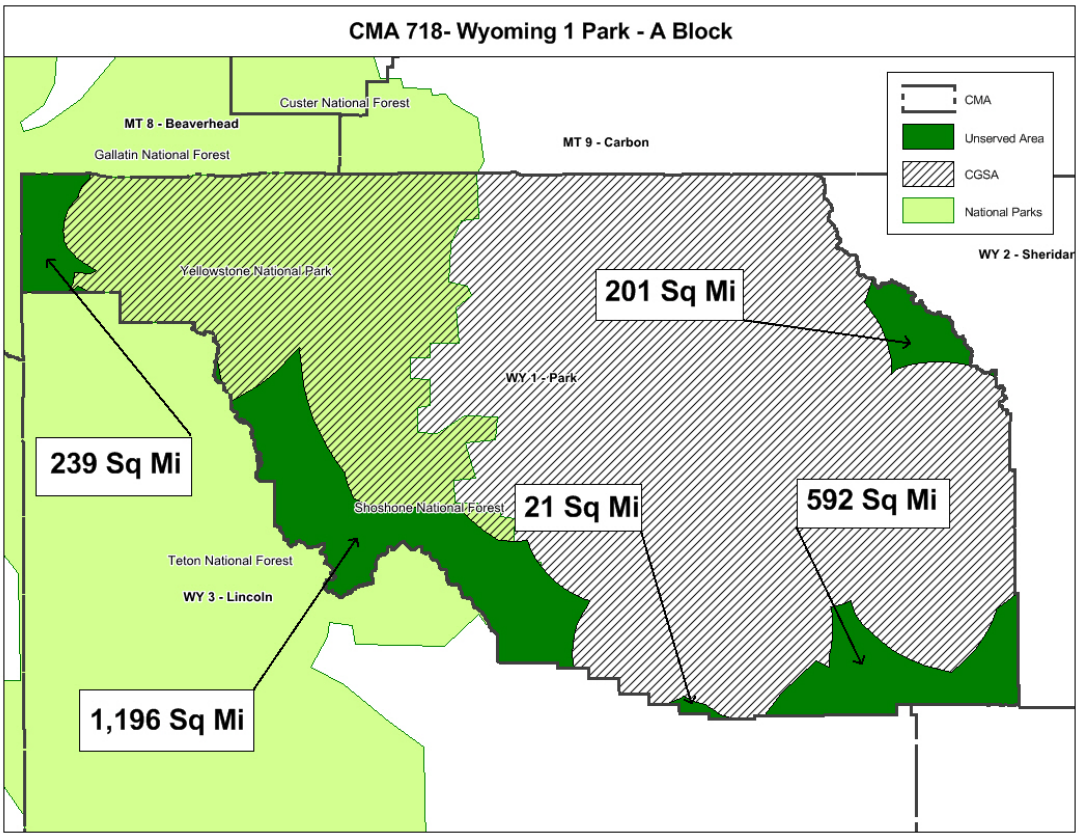


Many other CMAs fit this example. For all CMAs in this class, it is futile to auction an overlay license. No additional coverage could be provided. Yet, the proposed rules would force the Commission to auction CMAs with only these unserved areas.

Moreover, those few CMAs with larger slices of unserved area that may be "servable" from a technical perspective will often not present sufficient economic incentive to deploy a wireless system, either because the terrain is too difficult to cover or the area is comprised of government lands. By way of example, the maps below of CMA 368 – FL RSA 9 Calhoun and CMA 718 – WY RSA 1 Park illustrate the futility of attempting to auction areas that are not servable due to difficult terrain or the existence of government lands where wireless facilities are not compatible. In those CMAs, larger swaths of unserved area remain, 123 square miles and over 2,200 square miles, respectively, but much of the areas are not servable because substantial

portions exist within National Forests or National Parks, where cellular licensees cannot easily locate a site.





Again, an overlay licensee is unlikely to provide any additional coverage in such difficult to cover areas. Yet, the proposed rules would require the auction of the entire CMA. The status of these CMAs in these respects is not likely to change. These areas remain unserved after 25+ years of cellular service build-out for these very good reasons, which will similarly impact overlay licensees.

These uncertainties create the disincentives to bid in an overlay auction—potential bidders will see little value in bidding on a license with illusory rights. In that event, the Commission would be faced with the possibility of a failed overlay auction and rules that prevent incumbent cellular licensees, often in the best position to service the unserved areas, from expanding into those unserved areas unless they acquire the overlay licenses.[9] This result—no

[9]The overlay auction does not lead to the introduction of additional spectrum, as cellular service spectrum is already utilized by the incumbent cellular licensees.

more of an unreasonable possibility than the failure of 700 MHz D-Block auction—would only serve to delay broadband expansion into unserved areas.

Proceeding with an overlay auction when the prospect of improving coverage as a result of that auction is less likely than under current rules would disserve the public interest. It also would depart from the Executive Order 13563 requirement that each agency "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs."[10] In this case, a reasoned determination would find the absence of any legitimate prospect of a material increase in build-out in unserved areas arising from an auction. These facts demonstrate that the overlay auction proposal is likely to defeat one of the purposes that the proposed elimination of site-based filings was designed to achieve—efficient expansion of coverage.

B. The Overlay Auction Proposal is Overly Complex and Undermines the Commission's Efforts to Reduce Administrative Burdens, Increase Flexibility, and Further Regulatory Parity.

In the *Notice*, the Commission proposes to transition cellular service to geographic-area licensing to reduce administrative burdens, increase flexibility for cellular licensees, and bring cellular service in parity with other similar mobile services. Yet, the overlay scheme proposed in the *Notice* is overly complex and undercuts these stated goals. Transitioning CMAs to a geographic area license system in two stages that are seven years apart is incredibly complex and confusing. It will require licensees to apply different rules to different CMAs, anything but a recipe for simplicity and easing administrative burdens.

Adding overlay licensees that would be required to operate without interference with one or more incumbent cellular licensees injects additional technical complexities, with the need to coordinate with one or more systems. Cellular licensees have long coordinated successfully with

[10] Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

neighboring licensees, but adding a second licensee in each CMA in this most heavily utilized mobile wireless band will change that equation. Disputes will almost surely develop with overlay licensees over the extent of interference protection and the extent of the overlay licensee's right to cover areas that it may believe that the incumbent cellular licensee no longer sufficiently serves, creating substantial burdens for incumbent licensees and requiring the dedication of significant resources to resolve. These uncertainties are exacerbated by the absence of language in the *Notice* or in the proposed new rules clearly protecting, or defining the scope of, the incumbent cellular licensee's rights.

Further, as referenced in more detail below, the proposed rules would not only prevent incumbent cellular licensees from expanding service into unserved areas, but would also prohibit licensees from extending any SAB from additional transmitters outside of the CGSA. This proposed rule would effectively freeze the networks of incumbent cellular licensees, as it would preclude network advances that require additional transmitters. Though perhaps unintended, handicapping incumbent cellular licensees in this manner undercuts the flexibility that the transition to geographic-area licensing would otherwise provide to incumbent cellular licenses to adapt their networks to advances in technology and marketplace demands.

An overlay auction for cellular licenses also undermines the regulatory parity between cellular service and other mobile services that was furthered by the transition to geographic area licensing. Cellular licensees are similar to other wireless licensees, such as PCS, AWS, and 700 MHz licensees. Yet, the Commission would single-out incumbent cellular licensees for a uniquely burdensome scheme, awarding a secondary right to third parties to operate in already utilized spectrum, even if the incumbent cellular licensee serves all of the CMA. This residual "right" that would be awarded to overlay licensee risks would undermine the investment-backed

expectations of incumbent cellular licensees, which have invested substantial resources for decades to build-out the CMAs and serve the public.

C. The Commission Does Not Have the Authority to Impose an Unwarranted and Counterproductive Overlay Auction System.

The Commission's authority to adopt an overlay auction plan for cellular service is also subject to question. Section 309(j)(1) of the Communications Act authorizes the Commission to use competitive bidding to award only "initial" licenses, but an overlay license would be anything but the "initial" license. Cellular licenses were initially awarded in the very same band, over the same CMAs and for the very same services (mobile wireless services) as the proposed overlay licenses. The overlay licenses would be merely duplicative of the initial licenses. Indeed, given that these bands are already licensed for the same services, and in many cases, fully deployed, and that procedures for covering unserved areas (complete with auctions in the case of mutually exclusive applications) already exist, the "overlay" license scheme seems designed predominantly to generate revenue, in violation of Section 309(j)(7)(A) of the Communications Act.

Additionally, Section 309(j)(6)(E) of the Communications Act requires the Commission to "use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."[11] Yet, the Commission's stated justification for the overlay auction flies in the face of that requirement:

> [W]e believe that it would be in the public interest to adopt the transition described below, which allows the filing of mutually exclusive applications that would be resolved through competitive bidding . . . .[12]

[11] 47 U.S.C.A. Section 309(j)(6)(E) (2011).

[12] *Id.* at 13.

It should be noted that the Commission already has a process to accept applications for unserved areas, and conducts auctions in cases where mutually exclusive applications are received. However, its overlay auction proposal is designed to provoke, rather than avoid, mutually exclusive applications for the purpose of holding auctions. Rather than pursue this overlay auction strategy, the Commission should consider other means of achieving its regulatory purposes—means that do not involve proceeding directly to the creation of new, mutually exclusive licenses, that will necessitate an auction of overlay licenses.[13]

D. Retaining the Phase II Unserved Area Rules is the Optimal Alternative to the Overlay License Regime.

Rather than risk impeding broadband build-out by adopting an unnecessary, counterproductive, and legally suspect overlay license regime, the Commission should consider a more simplified proposal—immediately transition all CMAs to geographic-area licenses and retain the current Phase II unserved area rules to allow anyone, including incumbent cellular licensees, to apply to provide service in unserved areas. Under this proposal, every cellular license would transition into a geographic-area license by eliminating most site-based filings. Each cellular license area would consist of that licensee's CGSA as of a date certain after the effective date of the rules. And, cellular licensees and others could continue to apply to serve unserved areas. A cellular licensee seeking to expand its CGSA would file a Phase II unserved area application, in the same manner as it would do today. While cellular licensees that seek to expand CGSA would still need to make site-based Phase II filings, the filings would be entirely voluntary, as licensees that do not seek to expand their CGSA into unserved area will have no

[13] The overlay auction proposal also would run afoul of Administrative Procedures Act requirements as arbitrary, by replacing an unserved area regime that works with a more costly and troublesome approach that would inhibit coverage expansion, and because it would treat similarly situated licensees differently. It also would amount to retroactive rulemaking and raise issues under contract law and the takings clause.

site-based license filings. Further, the number of filings will be much fewer than the volumes of technical filings that are currently required and, as a result, cellular licensees and Commission staff will continue to benefit from a substantial reduction in administrative burdens.

Cellular licensees would also have the greater flexibility to modify their systems, which the transition to geographic-area licenses was intended to engender. Cellular licensees could modify and upgrade their systems as technology and the marketplace demands, without the need for most administratively cumbersome filings. In fact, retention of the Phase II unserved area rules affords greater flexibility to cellular licensees, which would retain the ability to seek an expansion of their CGSA into unserved areas if needed to meet consumer needs, could modify their SABs as needed provided that field strengths are limited or SAB extensions are authorized, and could upgrade their networks without the need to coordinate with overlay licensees holding duplicative, if ill-defined, rights to the very same spectrum in the very same geographic areas.

Given that adopting this simplified proposal would allow the Commission to realize the goals it enunciated in the *Notice*—increasing flexibility for cellular licensees, reducing administrative burdens to such licensees and Commission staff, and continuing to provide access to unserved area to allow for coverage expansion—without the substantial deficiencies of an overlay license system, the Commission should take the smaller step of transitioning cellular licenses to geographic-area licenses and retaining the Phase II unserved area application process for expansions of CGSA.

III. MODIFICATIONS ARE NEEDED TO THE PROPOSED OVERLAY AUCTION AND LICENSE RULES TO MINIMIZE ADVERSE CONSEQUENCES TO INCUMBENT CELLULAR LICENSEES AND THE AMERICAN PUBLIC.

As explained above, an overlay license system is unnecessary, unproductive, overly complicated, and presents a very real risk of impeding broadband build-out over cellular

spectrum in unserved areas. Nevertheless, if the Commission decides to proceed with an overlay license regime, the Commission should modify the rules proposed in the *Notice* to maximize the chance of a successful auction and to the extent possible, to minimize the burdens on incumbent cellular licensees.

A. Limit Auctions to CMAs with More Than 50 Square Miles of Contiguous Unserved Area.

In the *Notice*, the Commission proposes to auction overlay licenses for all CMAs, including those CMAs where no unserved area remains, and to authorize overlay licensees to provide cellular service throughout all unserved areas. This proposal is contrary to Commission precedent and serves no practical purpose.[14] Rather, if the Commission proceeds with an auction, only those CMAs with more than 50 square miles of contiguous unserved area should be included, and new licensees should have rights only to those unserved areas.

The Commission has historically recognized 50 square miles as the smallest area that can be effectively served by a licensee other than an adjacent, incumbent licensee.[15] This requirement recognizes the technical infeasibility of consistently creating a viable wireless system within an area of less than 50 square miles. As the Commission recognizes in the *Notice*, unserved area within a CMA "may be very small, fragmented, and/or not immediately servable."[16] In the case of CMAs that are already fully served, there is no unserved area in which the overlay licensee can provide service. In these situations, the overlay licensee would be a "licensee" in name only, and have mere illusory rights to serve the area. Absent reasonable grounds to deviate from its standing, the Commission should not auction licenses that overlay

[14] *See Notice* at 13.

[15] 47 CFR §§22.951, 27.14(g)(3), 27.14(h)(3), 27.14(i)(3).

[16] *Notice* at 16.

incumbent licensees' existing CGSAs. Instead, should it pursue auctions, the Commission should only offer licenses for contiguous unserved areas of 50 square miles or more.

B. Rule Changes Must Adequately Protect Incumbent Cellular Licensees.

If the Commission determined, in spite of the practical and legal infirmities of the overlay auction scheme, to proceed with that proposal, the Commission would need to further amend the proposed rules to protect cellular licensees and their customers.

1. Incumbent Cellular Licensee Protections.

The *Notice* and proposed rules focus on the prospect of the overlay auction to the potential detriment of incumbent cellular licensees. For example, the proposed rules contain only two references to the need for overlay licensees to protect incumbent cellular licensees, in a definition of "Cellular Overlay Authorization" and in the last clause of proposed rule 22.165(e). In many cases, incumbent cellular licensees have spent nearly three decades building out their CMAs and extending service to the public and have likely exceeded the coverage provided in all other comparable services. In light of the incumbent cellular licensees' interest in these licenses, the rules should more clearly define the primary status of the incumbent cellular licensees and other protections afforded to those licensees.

2. Eliminating Site-Specific Filings.

While the *Notice* explains that incumbent cellular licenses will transition to a geographic-area licensing system, the proposed rules do not make clear that incumbent cellular licensees will no longer need to make site-based filings. The Commission should revise the proposed rules to clarify that as of a cut-off date, the incumbent cellular licensees need not make site-based license filings except possibly as proposed above for a Phase II application to cover unserved areas.

3. SAB Overlaps.

As referenced above, the proposed rules would effectively freeze the incumbent licensees' networks by requiring that the SABs from any additional transmitters remain within the CGSA.[17] This proposed rule imposes an absolute prohibition on new SAB extensions, exceeding the restrictions under current rules, which allow SAB extensions by agreement. Additional transmitters should be allowed to extend beyond the incumbent cellular licensee's CGSA provided that the extensions fall within an authorized SAB extension or are authorized by a Commission grant. As the Commission knows, a licensee's SAB is not necessarily coextensive with its CGSA and SAB extensions are often required to insure coverage throughout the whole CGSA. The new rule also undermines any benefits to incumbent cellular licensees from the adoption of field strength limits, which would typically allow an extension of the SAB provided the field strength at the border falls within the limits set by rule.

a. Eliminate SAB Restrictions.

Proposed rules 22.165(e)(1) and (2) would prohibit SAB extensions from "additional transmitters" beyond the CGSA for all incumbent licenses—those licenses that have been auctioned and those licenses that have not yet been auctioned. As proposed, these rules would limit SAB extensions much more than current rules and effectively freeze incumbent cellular licensee networks. Limiting SAB extensions in this manner would preclude extensions into areas where the incumbent licensee has a preexisting agreement consenting to the extension. The Commission should allow incumbent cellular licensees to benefit from existing SAB extension agreements.

[17] *See Notice* at 68 (proposed rule 22.165).

This restriction also has the potential to preclude incumbent cellular licensees from upgrading their networks if the upgrades would necessitate even a slightly modified SAB. For example, an incumbent cellular licensee seeking to upgrade its cellular network to LTE may need to place additional antennas at the top of an existing tower, which might slightly alter the SAB. If the incumbent cellular licensee can make this change within the field strength limits proposed, it should be allowed to do so or obtain consent to exceed the field strength at the market boundary from the neighboring cellular licensee on the same channel block. However, the outright prohibition on SAB extensions in the proposed rules would preclude this result, regardless of the field strength at the market boundary. Incumbent cellular licensees would be left with the option of reducing cellular service associated with the proposed LTE upgrade because it cannot alter an existing SAB or not upgrading service, neither of which is in the public interest.

Moreover, the regulation of SABs is unnecessary under the proposed rules and can be eliminated. AT&T agrees with the Commission's proposal to adopt field strength limits, but those limits should replace, not supplement, restrictions on SAB extensions. PCS, AWS, and 700 MHz services are not restricted by both SAB restrictions and field strength limits. Cellular service should be treated in parity with those comparable services. If a licensee can meet the field strength limit at the border of its service area or obtains consent to exceed the field strength limit from the neighbor licensee, then any SAB overlap arising from that field strength is acceptable.

Nevertheless, it is important that any new rules recognize the continuing validity of previously authorized SAB extensions, even if such extensions would cause a licensee to exceed the field strength limit. Consents to SAB extensions provided to licensees operating in the

adjacent market should not be rescinded by regulatory fiat nor should licensees with existing SAB extension agreements be required to obtain field strength agreements. A failure to recognize the validity of existing SAB extension agreements would impose a significant hardship on licensees and consumers, as licensees would be required to initiate a wholesale redesign of their networks in a manner that would reduce, not increase coverage, or engage in an administratively arduous and time-consuming tasks of negotiating new agreements with adjacent licensees, which may not be willing to agree to the changes. The disarray that would be created would not serve the public interest and would undermine the goals set forth by the Commission in the *Notice.*

b. Resolve Inconsistencies in the Imposition of SAB Restrictions

Although the proposed rules would prohibit the SABs of incumbent cellular licenses from extending beyond their CGSA, conspicuously absent is a corresponding restriction for the proposed overlay licenses. This example demonstrates the overwhelming focus of the proposed rules on an overlay scheme that is ripe with problems and that, by design, would deliver negligible public interest benefits, to the detriment of incumbent cellular licensees. The Commission should remove the reference to SAB extensions in the proposed rules and rely exclusively on field strength limits, with a right to exceed the field strength limits with a neighboring licensee's consent. Yet, if incumbent cellular licensees are prohibited from extending SABs beyond their CGSAs, then overlay licensees should similarly be restricted from extending their SABs beyond the unserved areas where they are authorized to provide cellular service.

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Respectfully submitted,

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